VIRGINIA AGRIBUSINESS COUNCIL

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We Represent Virginia Agribusiness with a Unified Voice

November 8, 2010

Water Docket
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave., NW.
Washington, DC 20460.
Submitted Online: http://www.regulations.gov/

Re: Docket ID #: EPA-R03-OW-2010-0736

To Whom It May Concern:

On behalf of the members of the Virginia Agribusiness Council, we respectfully submit the following comments on the Draft Chesapeake Bay Total Maximum Daily Load (Draft TMDL), released for public comment on September 24, 2010, 75 *Fed. Reg.* 57776 (Sept. 22, 2010) (Docket Number EPA-R03-OW-2010-0736) (hereinafter Draft TMDL).

Agriculture and forestry represent the number one industry in the Commonwealth of Virginia, generating $79 billion in economic impact and 10.3% of employment. The Virginia Agribusiness Council represents farmers, foresters, processors, manufacturers, and suppliers of agricultural and forestal products, as well as approximately 40 commodity associations. It is essential that our agribusiness industry be fully engaged in the development of the Chesapeake Bay TMDL. Thousands of farms and forests in the Commonwealth will be directly impacted. We appreciate this opportunity to provide public comment on the Draft TMDL.

According to EPA, the "Chesapeake Bay TMDL is the largest, most complex TMDL in the country, covering a 64,000-square-mile area in seven jurisdictions." EPA is proposing two separate sets of load allocations and waste load allocations for three pollutants in 92 water body segments. For Virginia, which has approximately 40 water segments, this means that there are 120 separate TMDLs for the Commonwealth's portion of the Chesapeake Bay.

The Draft TMDL allocations are based on the Chesapeake Bay watershed model (5.3) (Model) updated in June 2010. While parts of the Model have been made available for public review, others have not been accessible to the public during the full course of the Public Comment period. The scenario builder data heavily utilized by Virginia officials in calculating agriculture reductions in the Draft TMDL and WIP, were not made available until November 5, 2010, just three short days prior to the close of the public comment period.

EPA has admitted that the Model is flawed, specifically related to the credit given for nutrient management planning, a key component of agricultural reductions, and plans to make changes to the Model in 2011- several months after the EPA finalizes the Bay TMDL. Despite these known flaws, and significant delays in EPA's initial schedule for providing states load allocation, EPA required states, including Virginia, to submit draft a Watershed Implementation Plan (WIP) in an inadequate period of time. Target loads for nutrients were provided on July 1, 2010, sediments on August 13, 2010, and draft WIPs were due to EPA on September 1, 2010. Maintaining strict deadlines when EPA itself missed deadlines to provide states with information has led to inadequate time for states to develop WIPs, and an inadequate public comment period. While our request to extend the Comment Period to 120 days has been denied, we again respectfully petition EPA to reconsider and give adequate time for public review, stakeholder input, and state negotiations. Based upon the inadequate public comment period, we respectfully reserve the right to supplement these comments as additional information and analysis becomes available.

The comments provided below will address a) environmental progress made by agribusinesses, b) questions regarding the legal and policy issues that arise from EPA's assertion of authority over implementation of the Draft TMDL, c) Virginia's overall approach taken in the Draft WIP, d) concerns with costs associated with implementing the TMDL and current economic conditions, e) specific comments regarding the agriculture sector section of the draft WIP, f) specific comments regarding the urban/suburban sector section of the draft WIP, and g) concerns regarding EPA's proposed backstop measures on our industry.

A) Environmental Progress Made by Agribusinesses

Our agribusiness industry, comprised of farmers, foresters, green industry, agribusiness suppliers, and processors, is committed to environmental stewardship. Clean water and productive soil are fundamental to our businesses. We have been doing our part- and will continue to do so in order to help create a healthy Chesapeake Bay and local waters. Specifically:

- Agriculture has met 52% of reduction goals for Nitrogen and 50% for Phosphorus and Sediment—all through a voluntary, incentive based program in Virginia. This doesn't even count the actions farmers are taking on their own without funding.
- According to the Virginia Department of Forestry, 83% of logging jobs use the proper combination of best management practices.
- University studies have shown that turfgrass, when maintained properly, serves as an excellent filter for stormwater runoff, can be a carbon sink, and captures sediment.

The agribusiness industry has been a willing partner in making environmental progress, and has proven so with our actions, time and time again.

Virginia has invested over $80 million into the Agricultural Best Management Practice (Ag BMP) Cost-Share program since 2006. Farmers have matched this spending with $48 million of their own funds (approximately $0.60 of every dollar) and are lined up at the door to do more. While these amounts are significant, this voluntary program has been extremely underfunded by the state and federal government. Annually, willing participants are turned away due to lack of adequate funds at the state and federal level. Even without cost-share funding, agriculture is still taking action. Virginia farmers fence cattle from streams, practice conservation tillage, use proper nutrient management practices, and install buffers along waterways- without federal or state funds- and without being "counted" by EPA in the Bay Model. Substantial progress is, without a doubt, being made.

Without regulatory pressure, the turfgrass/green industry requested that the state create an Urban Nutrient Management Program so that their professionals can have plans specifically tailored for their businesses. Lawn care operators have supported and signed Voluntary Water Quality Agreements with the state. Major home lawn fertilizer companies have signed agreements to reduce and/or eliminate phosphorus from turf maintenance fertilizers by 2012. Virginia's golf industry, through an industry-led initiative, is developing a Best Management Handbook covering water quality, pesticide use, and water supply issues for their industry to implement. These actions clearly demonstrate this sector's positive commitment to nutrient reductions.

B) <u>Legal and policy issues that arise from EPA's assertion of authority over implementation of the Draft TMDL</u>

In comments submitted by a group of interested agricultural organizations at the state and national level to EPA regarding the Draft Chesapeake Bay TMDL, specific legal questions were raised regarding EPA's assertion of authority over implementation of the Bay TMDL and Virginia's Draft WIP. We call your attention to these comments and encourage EPA to respond to them. Specifically, we question EPA's threats to retaliate against watershed jurisdictions that do not develop WIPs conforming to EPA's expectations. We believe that these threats exceed EPA's authority under the Clean Water Act (CWA). These comments highlight concerns including a) EPA has failed to provide meaningful public review of the Draft TMDL, b) the Draft TMDL is arbitrary and capricious, and c) the Draft TMDL is contrary to law.

We are encouraging Virginia to continue to establish a plan for implementation of the Chesapeake Bay Watershed TMDLs in a manner that Virginia believes is best

for Virginians and the environment and continues Virginia's recognition of the tremendous progress that has already been made by the agriculture community.

C) Costs associated with implementing the TMDL and current economic conditions

Virginia officials recognized in their cover letter submitted to EPA on November 3, 2010 that the Bay TMDL and Virginia's WIP will have a high cost for compliance for all sectors. While we agree that there is a benefit of clean waters within the Bay and local watersheds, the economic costs for compliance must be balanced. Water quality programs cannot be developed in a vacuum without considering the impacts to all economic sectors. To this end, we strongly urge EPA to conduct a non-biased economic impact analysis and have encouraged Virginia to do so as well. Experts from land-grant universities from across the watershed could be called upon to evaluate the actual costs of meeting water quality standards for businesses, citizens, localities, states, and the federal government.

Agriculture is able to estimate some costs of TMDL implementation based on existing data of implementing Ag BMPs through current state and federal programs. For example, Virginia estimates that full implementation of just one practice (cattle fencing) could cost more than $800 million to implement. Fencing cattle from streams, putting in crossings, providing alternative watering systems, etc. costs on average $30,000 for a Virginia cattle farmer. Virginia cattle producers, many of whom farm part-time, do not have extra income from their farming operation available to afford an additional $30,000 to implement this practice.

The 2009 Needs Assessment of the Virginia Natural Resources Commitment Fund states that Ag BMP cost-share funds needs will reach $63.2 million annually in 2025 to get 60% NPS reduction goals from agriculture. This is only funding from the state and does not account for federal government's traditional share of funding or the shared match that comes from farmers. Current funding estimates are only based upon the cost of installing the practice, they do not account for costs such as loss of productive land, replacing practices when weather damages occur, and fluctuations in market conditions.

Current economic conditions within the agribusiness industry are extremely difficult. Just as the rest of the nation's economy has suffered over the past several years, agribusiness sectors have also suffered from several years of profit losses, increased input costs, and limited credit options for individual producers, companies, and operations. The current economic condition in our agribusiness industry simply means that for some, additional monetary resources necessary to meet new regulatory burdens is non-existent. Federal backstops, including new permitting of small dairies and additional, burdensome CAFO requirements, will be enough to drive some farmers out of business if implemented. EPA's federal backstops requiring more

unregulated lands to meet MS-4 (urban lands) requirements may cause significant economic hardship for urban landowners, thereby impacting the green and turfgrass industries.

To meet reduction goals, cost share funding is more than critical in meeting the demands of EPA. Agriculture, lawn care, turfgrass, forestry, have all seen depressed profits, just as the State and local governments have been facing historic deficits. Individual businesses, farmers, and the State cannot meet this unfunded mandate from EPA without significant federal and state funding. These funds must be actually appropriated dollars, not just potentially empty promises.

D) Virginia's overall approach in the Draft WIP

In Virginia's September 3, 2010 cover letter to EPA, Secretary Domenech highlights the state's ongoing efforts to improve water quality in the Bay over the past two decades, recognized the severe economic conditions currently faced by Virginians, and the high cost of implementation of the draft WIP. He further promotes a system built upon flexibility and cost-effectiveness to meet these goals. We concur.

Our industry supports Virginia's approach in the Draft WIP to utilize adaptive management, nutrient trading, and flexibility in meeting goals. Implementing the WIP and the Bay TMDL will be costly. In order to best balance the needs of a growing economy with water quality, we support a) adequate and reliable cost-share and technical assistance for agribusinesses, b) providing flexibility and certainty, c) balancing water quality reductions with economic impacts to industries, d) a trading program that allows for all economic sectors to participate, and e) utilizing adaptive management based upon economic conditions, future advancements in practices and technologies, and true water quality data. Virginia's draft WIP sets the course for such actions.

In general, if EPA is requesting additional detail be provided by the Commonwealth on current programs, we encourage the state to work with EPA to determine the types of information necessary to meet their expectations. Adding additional explanation of current programs will clearly prove that Virginia, through statute, regulations, inspections, and voluntary programs, has taken great strides in meeting water quality goals, and through full utilization of these programs, can make even more progress in the decade to come.

E) Agriculture Sector Section of the Virginia Draft WIP

Fully Utilizing Existing Programs, Adding Details, and Increasing Staff
As already stated, state officials should continue working with EPA staff to add details regarding current permitting, regulatory, inspection, and voluntary programs to the draft WIP. Further, we support utilizing current programs, statutes, and

regulations to their fullest extent, examining areas where additional staffing, resources, and funding are necessary, and working to address these shortfalls over time. We urge the state to continue efforts to get full credit for all actions taken resulting from regulatory or permitted actions, as specified in the SB 346 Study Report (November, 2010).

If provided with adequate funding and staffing, the Agricultural Stewardship Act (ASA) can be utilized to ensure compliance with water quality laws and serve as an enforcement tool that EPA is demanding. We encourage the State to include information on expanded staffing and utilization of the ASA program in the re-draft of the WIP.

Ag BMP Cost-Share Funding Is Critical

We continue to support adequate and dedicated funding for cost-share assistance and technical assistance provided through the Virginia Agriculture Best Management Practices Cost-Share program and Soil and Water Conservation Districts. The draft WIP should be amended to reflect a formula utilized to determine Cost-Share and Technical Assistance funding needs, based upon state, federal, and farmer share of costs. We are gravely concerned about including unrealistic BMP implementation goals without any guarantee that government cost-share and technical assistance will be available in the future. Just as the state and farmers will be held to an expectation by the federal government to meet funding goals, so should the federal government. If TMDL goals are not met due to lack of available and adequate funding, the industry should not be left to deal with consequences.

Accounting of Voluntary Best Management Practices

We applaud the state's inclusion of plans to address the inherent problems with the current system of tracking and verifying agricultural best management practices (Ag BMPs) within the Chesapeake Bay Model. We continue to work in earnest with state officials to implement the terms of SB 346 (Hanger) which will set the state on a course towards tracking and accounting for voluntary best management practice implementation. As envisioned in the WIP, it is critical that regulatory practices already mandated, such as those associated with the Poultry Waste Management Act, biosolids regulations, the Agricultural Stewardship Act compliance, and the Chesapeake Bay Preservation Act, for example, be accounted for fully within the Bay Model. Adequate staffing will be crucial to begin implementing this critical program as a means to account for the significant conservation practices already implemented by agriculture already.

Resource Management Plan (Conservation Plan) Approach

As advocated by industry representatives during the WIP development process, utilizing Resource Management Plans (Conservation Plans) will achieve Bay improvements in an economically sensible, scientifically based manner. Specifically, a resource management plan should constitute a suite of Best Management Practices

(BMPs) most appropriate for each farm. Each farming operation is unique with respect to its conservation needs. Each varies in its potential to affect water quality. A Resource Management Plan which addresses nutrient management, soil conservation, riparian management, and stream protection as needed, is the most effective means of determining the appropriate BMPs for any given farm. We will continue to work with state officials to further develop this program to ensure that it is effectively and fairly utilized by the State in meeting Bay goals.

Other Specific Questions and Concerns on Agriculture Section

- Gap Analysis (page 57) - It is not clear which table is referenced in the first paragraph; this should be clarified or deleted.
- Nutrient Management Plans (page 62) - There are two dates listed as goals; 2020 for 95% implementation and 2017 for increases in NMP plan writers. Shouldn't these be consistent?
  There should be further discussion on phase-in plans with impacted stakeholders.
- Conservation Tillage and Soil Conservation Plans (pages 62-63) - Industry representatives have raised concerns regarding the equitability of focusing conservation efforts on large farms initially (phase-in proposals), and as such, further discussions with impacted stakeholders must occur.
- Livestock Stream Exclusion (page 63) - The basis for expectations for farms with a certain number of cows needs further discussion with impacted stakeholders. The section should also be amended to reflect the need for more flexible standards in fencing types, buffer restrictions, and grazing rules.
- Container Nursery and Greenhouse Runoff and Leachate Collection and Reuse (page 65) – This specific practice is not currently established as a BMP by DCR, or to our knowledge, credited in the Bay model. Until discussions with impacted industries occur and such a BMP is created, it should not be included in the WIP. The specifics of this practice have not been fully vetted with the impacted industry and there remain many questions from industry, particularly land-locked, small, and retail/distribution operations as to adoption, affordability, and feasibility of this practice.
- Contingencies (page 66) – Further discussion with impacted stakeholders regarding contingency plans must occur. The provisions regarding potential mandates of BMPs for land-use taxation has never been vetted with agribusiness industry representatives.

F) Urban/Suburban Sector Section of the Virginia Draft WIP (Turfgrass industry specific)

Urban Nutrient Management

The draft WIP envisions greater restrictions on nutrients in turf and lawn care fertilizer products. Members of the fertilizer, lawn care, golf, and green industries have identified that certain provisions of the draft WIP may be feasible to implement

provided they are approached in a cost-effective manner for impacted industries. Below, we outline amendments and additions to the draft WIP we suggest to specific sections in order to achieve this goal.

Stormwater BMP Cost-Share Program (page 78) – We applaud the state's inclusion of plans to create a stormwater BMP Cost-Share Program and encourage including items such as urban nutrient management, proper fertilizer applications, and incentives for utilizing more efficient nutrient products in this program. In the current economic conditions, without adequate cost-share funding goals, such as Nutrient Management for golf courses, may be unattainable.

Use of Voluntary Water Quality Agreements with DCR (page 78) – The industry appreciates recognition of this important voluntary program in collecting data from willing participants within the lawn care industry. We urge the state to also expand the funding and resources provided to this program so that additional companies may participate. There is a willingness from the industry to expand the use of this program; however it is currently limited due to resources and staffing.

Nutrient Management Plans on Golf Courses (page 78) – Adequate time must be given to allow for plan writers to be certified in the Urban Nutrient Management program and for plans to be written. Further, cost-share assistance will be critical in helping some golf courses, both public and private, meet this goal.

Sales Restrictions on Do-It-Yourself Non-Agricultural Lawn and Turf fertilizers: Slow Release Nitrogen (page 78) - We encourage state officials to work with the industry in assessing this goal over the next several years, as technology, practices, and products are constantly changing in this area.

Sales Restrictions on Do-It-Yourself Non-Agricultural Lawn and Turf fertilizers: Time of Year Restrictions (page 78) - Due to climate and grass type differences across the Commonwealth, and the various nutrient needs based upon these differences, the industry urges the state to base any restrictions on no applications to frozen ground, as established in DCR's Nutrient Management Standards & Criteria.

Sales Restrictions on Do-It-Yourself Non-Agricultural Lawn and Turf fertilizers: Ban Phosphorus (page 79) - The wording of this section should be changed to reflect that it is actually a restriction on the phosphorus content of certain fertilizer products, not a ban on all use of the products in all situations. There are circumstances, recognized by the exemptions outlined in the draft WIP, where application of phosphorus may be necessary for home lawns and turfgrass. Further, the industry urges the state to also provide an exemption in the WIP for biosolids and products with naturally occurring phosphorus. This would parallel other states that have enacted similar restrictions on phosphorus use.

Ban on Nitrogen Containing Deicers (page 79) - If a ban on utilizing nitrogen containing deicers were to occur, adequate time (several years) to allow for retailers with the product to clear their inventory must be allowed.

Proper Storage and Disposal of Non-Agricultural Fertilizers by Retailers (page 79) – While a "good housekeeping" practice, it may be impractical and difficult to implement. In addition, the Bay Model does not give credit for this "practice" and as such, it should be removed from the WIP.

G) EPA's proposed backstop measures and additional regulations

Virginia's WIP reflects some practices for both agriculture and turfgrass that we strongly believe, given proper implementation and funding, will result in significant water quality improvements, including:

- Agricultural Resource Management or Conservation Plans to meet the individual conservation needs of each farm will result in progress without mandating a "one-size-fits-all approach".
- Turfgrass/green industry practices through utilizing nutrient management plans, amending the content of certain fertilizer products, and educating homeowners, while carefully balancing the costs and unintended consequences of under-managed or under-fertilized turfgrass.

Simply put, if the state chooses to build off of the incentive-based practices and programs that have already resulted in progress for decades, EPA does not need to substitute its version of heavy-handed, government regulation. EPA's "backstop" measures put in the TMDL will certainly result in more costs for permitted facilities, such as large animal feeding operations, processing facilities, and urban landscapes.

As outlined in the legal analysis referenced earlier in these comments, we question the "reasonable assurance" offered by EPA's backstops, as current regulatory authority and details on new requirements are both unclear. Again, instead of forcing states to regulate their way out of "backstops," we urge EPA to allow Virginia to implement its own plans for achieving clean water goals—without costly, burdensome regulations.

The Chesapeake Bay Model, the basis for nutrient and sediment reductions required by EPA, has been shown to have extensive flaws in the data it utilizes. EPA even acknowledges this fact. EPA should not move ahead with costly mandates based upon flawed modeling and data. Examples include:

- In 2010, Virginia Cooperative Extension conducted a field observation study in Eastern Virginia. They found that 90% of crop acres were planted in no-till.

Only 15% of the acres are enrolled in DCR's no-till program. This equates to 75% of no-till acreage unaccounted for in the current Bay Model.

- It is our understanding that the Bay Model does not fully account for practices that are already mandated by state regulatory, permitting, and enforcement programs, including the Chesapeake Bay Preservation Act, the Agricultural Stewardship Act, and the Virginia Pollution Abatement Permitting program, to name a few.
- The model is currently "throwing out" actual, ground-truthed data from Virginia because it does not meet the "modeled" land use data. This is a misuse of funds and data when the practices are meeting all requirements set forth by EPA.

Federal actions must be based on accurate information. No additional regulations or penalties should be placed on states or industries until the science and data have been fully proven.

Conclusion

As the number one industry in the Commonwealth, the economic survival of agriculture and forestry must be the top priority. We embrace the need for clean water as a fundamental goal of our agribusiness industry. As an integral part of this goal, we believe that policies, programs, and incentives implemented to achieve water quality benefits, in particular Chesapeake Bay restoration, must balance this need for clean water with the world's need for food, feed, fiber, and fuel. Our industry is seriously concerned about the potential negative impacts that some proposals may have on the 500,000 direct jobs, the 1.5 jobs supported elsewhere in Virginia from each agribusiness job, and the almost $80 billion in annual economic impact that our industry contributes to the Commonwealth's economy.

Again, we appreciate the opportunity to provide input on the Draft Chesapeake Bay TMDL and Virginia Draft WIP, and look forward to continuing to work to make progress in meeting water quality goals while maintaining the future viability of the agribusiness in the Commonwealth.

Sincerely,

Katie K. Frazier
Vice President- Public Affairs

Cc: The Honorable Robert F. McDonnell, Governor
The Honorable Todd Haymore, Secretary of Agriculture & Forestry
The Honorable Doug Domenech, Secretary of Natural Resources

The Honorable Matt Conrad, Assistant Secretary of Agriculture & Forestry
The Honorable Anthony Moore, Assistant Secretary for Chesapeake Bay Restoration
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